Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

Jonas Weissman,

Petitioner

v.

Cohn, Lifland et al,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

Whether the courts below abdicated their jurisdiction on federal tax lien law and civil rights. 28 U.S.C. §1340, 1343 (a)(3)

Whether the courts below usurped power that no court has by allowing the holder of a state lien which has no priority over federal tax liens to execute.

Whether the courts below proceeded in ways contrary to this Court on matters of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and abstention.

Whether the actions of the courts below have exposed the petitioner to further deprivation of civil rights.

LIST OF PARTIES

Cohn, Lifland, Perlman, Hermann & Knopf, Esqs., Defendants
Albert Cohn, Head of Cohn Lifland, Defendant
Leonard Z. Kaufmann, Member of Cohn Lifland, Defendant
Diana Manning, Member of Cohn Lifland, Defendant
Maryann T. Stokes, Member of Cohn Lifland, Defendant
Lorraine Abraham, Esq., Court appointed receiver, Defendant
Superior Court of New Jersey, Bergen County Justice Center, Defendant
Judge Isabel Stark, individually and in her official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge Anthony Scuito, individually and in his official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge Patrick Fitzpatrick, individually and in his official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge Marguerite Simon, individually and in her official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge Arthur Troast, individually and in his official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge Jeffrey Gaulkin, individually and in his official capacity as Superior Court Judge, Bergen County Justice Center, Defendant
Judge John E. Wallace, individually and in his official capacity as Superior Court Judge, Bergen County Justice Center, Defendant

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PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

Petitioner hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals, Third Circuit, in this case.

OPINIONS BELOW

There are no reported opinions. All opinions of the Court of Appeals were done without comment and reproduced in the Appendix. The Order of District Court dismissing the action of February 4, 1997 and the second Order of District Court of February 6, 1997 are also reproduced in the Appendix.

JURISDICTION

The Order of the Third Circuit Court of Appeals affirming the Order of District Court of February 3, 1997 was filed on November 24, 1997. A timely petition for rehearing and/or rehearing *en banc* was denied on December 23, 1997 and January 4, 1998 as amended.

This court has jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the Constitution of the United States provides in pertinent part as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...

The Fourteenth Amendment provides in pertinent part, as follows:

SECTION 1...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

This case involves the following statute and regulation: 42 U.S.C. §1983, 26 U.S.C. §§6321, 6322, 6323, CFR Treasury §400.4-1, Fed. R. Civ. Proc. Rule 55, 28 U.S.C. §2410. The text of the foregoing are set forth in Appendix B.

STATEMENT OF THE CASE

This case concerns a civil rights complaint and request for injunctive relief that was presented to District Court on February 3, 1997. Jurisdiction was invoked by 1331, 1340, 1343(a)(3).

Declarative and injunctive relief was authorized by 28 U.S.C. §2201, 2202, and by 42 U.S.C. §1993.

Because the complaint was immediately dismissed *sua sponte* the allegations must be taken as true. *Cooper v. Pate* 378U.S. 546

The basis of the complaint was that judges of the New Jersey Superior Court, Law Division, Bergen County, were issuing Orders in aid of execution for the benefit of the holder, Cohn, Lifland, Perlman, Herman & Knopf (herein noted as CLPHK) of a state lien when federal tax liens had been filed previously and had priority. The date of the state lien is April 3, 1992. The first tax lien was filed on January 25, 1991. These Notices of Federal Tax Lien state, "As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code... Therefore there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer..."

The allegations depict numerous instances of deprivation of Fourth and Fourteenth Amendment rights. In all state court proceedings the petitioner presented that a prior filed federal tax lien

has priority. This was done by motion and by verbally stating so in court when there was a court appearance. All judges refused to rule on lien priority and ignored its presentation by petitioner.

CLPHK was awarded $250 a month for execution of their lien by Judge Troast on July 10, 1992. CLPHK had attached $721.20 from the petitioner's bank account and applied for a turnover of funds on August 7, 1992. The petitioner, between these dates, had become aware that a prior filed federal tax lien has priority. This was presented by motion and in court on August 7, 1992. In court on Aug 7, 1992, the seized funds were deposited into court. Maryann T. Stokes, for the firm of CLPHK, stated, "...We are willing to agree that the funds be turned over to the Court to be held until decided whether we get it or the federal government gets it." After the petitioner stated that the federal liens have priority, Judge Troast stated, "I am not deciding priorities."

On appeal, Appellate Division Judges Gaulken and Wallace stated in *per curiam* opinion, "We note only that neither the July 10, 1992 Order or the August 7, 1992 Order gives the Plaintiff (CLPHK) a priority over the United States Government."

The petitioner appeared in the offices of CLPHK on February 27, 1995 because of an Order for Discovery signed by Judge Marguerite Simon. The petitioner stated that there were prior filed federal tax liens and CLPHK had no right to execute and left.

CLPHK filed a Motion for Aid of Litigant's Rights. CLPHK also applied for turnover of funds deposited into court on August 7, 1992. Petitioner once again presented the priority of the federal tax liens by counter motion and in court. Judge Fitzpatrick signed an Arrest Order on April 3, 1995.

He did not sign the order for turnover of funds. This order was signed by Judge Marguerite Simon on April 6, 1995 in all absence of

personal jurisdiction. These were the funds that were deposited into Court on August 7, 1992.

The petitioner was brought to court on August 8, 1995, under arrest, and made to submit to discovery by Doris Manning, Esq., of CLHPK, which was entered into the state court records as an Information Subpoena..

In a letter that the petitioner received on September 5, 1995 by Leonard Kaufmann, Esq., of CLHPK, stated, "Enclosed you will find a true copy of an Order for Arrest signed by the Hon. Patrick Fitzpatrick, J.S.C. received in our office on August 31, 1995. Please be advised that we intend to pursue all rights attendant to said Order." This Order for Arrest was a copy of the April 3, 1995 Order under which the Plaintiff had been arrested on August 8, 1995.

The Petitioner was confused by this and notified Judge Fitzpatrick, who replied that he does not engage in anything *ex parte.* A Warrant for Arrest was forwarded to the Sheriff of Bergen County on September 1, 1995. The Petitioner was arrested and brought to court on March 6, 1996 before Judge Fitzpatrick. Judge Fitzpatrick called the second arrest on the same Order of Arrest "silly." There was no recognition on his part of the serious Constitutional deprivation that occurred by the petitioner being arrested a second time on the same arrest order. Leonard Kaufmann took this opportunity to present to court a motion for the appointment of a Receiver in Aid of Execution. Petitioner had received no notice of this Motion. During this hearing Judge Fitzpatrick on numerous occasions refused to give a ruling on the priority of a prior filed federal tax lien on request of the Petitioner. In court on March 6, 1996, Judge Fitzpatrick, after the Petitioner stated that prior filed federal tax liens have priority, stated, "They [CLPHK] have a right to the suit to determine whether you have sufficient funds to pay these monies. If there are other creditors [the United States of America] who are preferential to them, so be it. That's their problem."

After Judge Fitzpatrick had an *ex parte* conference with Leonard Kaufman, he agreed to sign the Order for the Appointment of a Receiver. Judge Fitzpatrick recused himself after Petitioner filed a Motion for Recusal, contesting the total lack of due process and malicious use of process.

This matter was then assigned to Judge Scuito, who had signed an Order on December 1, 1995 for turnover funds of $146.40 that CLPHK had attached from the Petitioner's bank account. Once again, the Motions to the court presented the prior filed federal tax liens and junior lien holder cannot execute. Judge Scuito recused himself in a letter dated December 3, 1996.

At a hearing on Motion Day, December 20, 1996, Judge Stark stated that she would sign an order for the appointment of a receiver. The Petitioner was not notified of this hearing and was not present. New Jersey court rules require a 16-day notice, which meant that the Petitioner would have had to receive notification on December 4, 1996, one day after Judge Sciuto recused himself. Judge Stark signed the Order for the appointment of a statutory receiver on January 6, 1997. The last line of the Order stated that the Petitioner cannot file any Motions without permission of the court. The state Order appointing a receiver put the Petitioner's property *in custodia legis* of state court in the presence of prior filed federal tax liens.

A civil rights complaint and request for injunctive relief was presented in District Court on February 3, 1997. The complaint was immediately dismissed *sua sponte* for lack of jurisdiction, termed the state order valid, cited *Younger* abstention, and stated that there was failure to state a claim under 42 U.S.C. §1983, and repeated that part of the state order which stated that the petitioner needed the permission of the state court to file a Motion. No Rules of Federal Procedure were cited.

The Complaint was dismissed without notice to the petitioner and prior to service. Petitioner received the Order the next day, February 4, 1997.

The statement in the Order justifying execution by a junior lien holder, "...particularly given that the priority lien holder, the IRS, elected not to enter the state court matter," is completely erroneous. The federal tax liens are statutorily protected, 26 U.S.C. §§6321, 6322, 6323. The Order allowed the holder of a junior lien holder to execute, which is contrary to federal law and many Court decisions.

Notice of Appeal was filed on February 4, 1997, Docket No. 97-5065.

On February 7, 1997 Judge Barry entered another order recorded in the docket on February 10, 1997 (February 7 was a Friday and February 10 was a Monday). This second order is absent any mention of the federal tax liens. The essential core of the controversy and complaint have been removed. It reads as if the petitioner's complaint concerns only the execution of a state lien and makes no claim under the Constitution or federal law. The second order was discovered by petitioner after receiving the Docket Entry Sheet on May 16, 1997.

The Petitioner, on February 25, 1997, received a letter from the Office of Staff Attorneys of the Third Circuit Court of Appeals signed by Ms. Elizabeth A. Cormier, stating,

> "This will advise you that the above captioned appeal will be submitted to a panel of this Court for possible dismissal due to a jurisdictional defect. It appears that this Court lacks appellate jurisdiction for the following reason:
>
> "The Order which you have appealed is not reviewable at this time by a Court of Appeals. Under 28 U.S.C. §1291

(enclosed), only final orders of the District Courts may be appealed."

On April 4, 1997, Petitioner received a letter once again from Ms. Elizabeth Cormier stating,

> "It would not be appropriate to submit this Appeal to the Court for a possible jurisdictional dismissal as you were originally advised by a letter of February 25, 1997...All parties are hereby advised, however, that this letter does not represent a finding of appellate jurisdiction in this case." (original emphasis)

A Motion for Emergency Relief was submitted by the Petitioner prior to the Third Circuit. This motion was received February 18, 1997 and was timely by the Third Circuit Court of Appeals LAR.

This motion alleged that the state receiver was taking actions to have complete financial control of the petitioner. All bank accounts were closed, the receiver was to receive all payments, all billing cards with outstanding balances, patients were to receive a letter instructing them to send payments to a custodial account, bills for the practice were to be paid by the receiver (she later stated verbally, and in writing, that payment of Petitioner's rent is "my discretion"), all mail must be opened in the presence of the Petitioner's receptionist, and in a letter of February 11, 1997 the Receiver made the threat, which is unlawful, to intercept Petitioner's mail. The Memorandum of Law which accompanied the Motion established the absolute priority of a prior filed federal tax lien and, among other decisions, cited *United States v. Equitable Life Assur. Soc. of U.S.*, 384 U.S. 322, 327-328. The State Order appointing a receiver can only be done when the State court "acquires primary jurisdiction over the property," *Culp v. Culp* 242 N.J. Super. 567, 572 and is therefore a judicial nullity. The

Memorandum of Law stated that "District Court does have a jurisdiction to enjoin an order of state court which is not valid, and deprives the plaintiff-appellant of Constitutional rights and was passed upon with complete lack of procedural and substantive due process and is violative of Acts of Congress. District Court does not have jurisdiction to allow a junior lien holder to execute in the presence of a prior filed federal tax lien. The lien remains attached to the property and divestiture can only occur in very limited circumstances by federal law."

Two amendments to this Motion were filed.

The Motion for Stay Pending Appeal was denied March 26, 1997 without comment.

Another Motion for Stay and Injunction pending appeal was filed April 30, 1997 because of threat of arrest by the court-appointed receiver and worsening financial condition of the petitioner. The Receiver had been given a total of $4,592.92 in receipts on February 11 and 20, 1997. Business expenses for $1,931.21 were paid. The receiver then stated that there was no more money to pay expenses. The petitioner at that point stopped giving the state-appointed receiver any further receipts, and the response of the receiver was a letter insisting on compliance in five days and to take possession of "all monies and the books and records of your practice" under threat to bring action for arrest.

The main legal points of this motion by the Federal Rules of Appellate Procedure 60 (b)(4) were that the state order appointing a receiver was void because state court usurped power in violation of due process and had no subject matter jurisdiction over the sovereign immunity of the United States.

This motion was denied without comment on May 6, 1997.

Petitioner filed an Appellant Informal Brief on May 17, 1997. It stated that the jurisdictional dismissal of the District Court Order of February 4, 1997 followed by dismissal for failure to state a claim upon which relief can be granted was legal error and abuse of discretion. Jurisdiction has to be assumed before the merits of the case can be reached. The petitioner was entitled to a federal forum on a substantial civil rights complaint. The controversy involved the priority of federal tax liens which were ignored by state actors, both private and public, which caused deprivation of petitioner's Fourth and Fourteenth Amendment rights. *Younger* abstention is improper where there is preemption by federal law, where state court proceedings entrench upon the federal domain and where the core of the controversy is federal constitutional claims.

CLPHK, the only responding named defendant, in their undated answering brief, invoked *Younger* abstention and the *Rooker/ Feldman* doctrine. CLPHK, in the Statement of Facts in the opposing brief, stated that the lack of response from the IRS after being notified of their executions by letter and copies of state motions and cross motions since February 1995 meant that the IRS approved. This is error. The United States requires notification by 28 U.S.C. §2410.

The Third Circuit Court of Appeals in an order dated November 24, 1997 stated that order of District Court of February 4, 1997 is affirmed and made reference to *Rooker/Feldman.*

Petitioner filed a Petition for Mandamus on June 7, 1997, caused by the discovery on May 16, 1997, the unprecedented second Order of District Court filed on February 7, 1997, in which all mention of federal tax liens were removed and because there was a show cause hearing scheduled in state court on June 10, 1997 which was threatening to the petitioner.

The state actors were continuing all efforts to execute on their junior lien. At the hearing on June 10, 1997, Judge Stark refused to hear that the order appointing a receiver was unconstitutional, the order denied procedure due process because the petitioner was not present or notified of the hearing on December 20, 1997. Judge Stark was severe. She threatened incarceration and called in several police officers when the Petitioner began talking about the priority of a federal tax lien. She stated he would be incarcerated, doubted the veracity of the Petitioner's income tax returns without any factual basis, made the statement, "You haven't offered Ms. Abraham [court-appointed receiver] any cooperation, corroboration of anything," when the receiver had received copies of the Petitioner's tax returns and copies of check registers for the past year. Judge Stark stated that if necessary she would sell my home and office furniture and equipment.

Leonard Kaufman, Esq. mentioned during this hearing a motion returnable on June 17, 1997 to hold the Petitioner in contempt for "filing certain pleadings in Federal Court."

The Order of Judge Stark dated June 23, 1997 reflected everything that was in court. The Order stated that the Petitioner was to give the court-appointed receiver all monies received from any source from February 21, 1997 to the present. It also stated that the Petitioner was to cooperate with the receiver to prepare an inventory of "all equipment, instruments, furniture and furnishings located at defendant's medical office and his home."

On June 18, 1997 the receiver closed down petitioner's checking accounts with $1,628.64. On June 24 she appeared in Petitioner's office, asked for the office receipts, and advised petitioner to "bring your toothbrush."

No further action on execution was taken by the state court receiver after June 24, 1997.

A Motion to expedite the Petition of Mandamus, Docket 97-5347, and requesting that it be heard by one Judge was hand-delivered to the Clerk's office of the Third Circuit Court of Appeals the following day, June 25, 1997. The motion was given to a person sitting in the Clerk's office who petitioner assumes to be a member of the office of staff attorneys. The person began to read the motion and had the Clerk tell petitioner, "You don't have to wait."

The Petition for Mandamus was denied and Motion to Expedite was dismissed as moot on July 18, 1997 by Chief Judge Sloviter and Circuit Judges Stapleton and Cowen.

The Third Circuit Court of Appeals issued an order November 24, 1997 affirming the order of district court of February 4, 1997. The petitioner submitted a timely petition for rehearing and/or rehearing *en banc*. These were denied December 23, 1997 and January 4, 1998 as amended.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari in this case because the opinions below of the Third Circuit Court of Appeals, without comment, are contrary to federal law and to numerous decisions of this Court concerning federal tax liens, federal judicial procedure, federal court abstention and civil rights. They allow the holder of a state lien which is junior to federal tax liens to execute with orders of state judges who acted in violation of the supremacy clause. They foreclose the petitioner from rightfully having a federal forum for civil rights deprivations. The court below failed to exercise its jurisdiction and exercised power it does not have.

I.
THE COURTS BELOW ABDICATED THEIR JURISDICTION ON FEDERAL TAX LIEN LAW AND CIVIL RIGHTS.

A.

28 U.S.C. §1340 Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue...

28 U.S.C. §1943 (a)(3) Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States...

The core of the controversy in this case is that State judges, in violation of the Supremacy Clause, Federal Constitution Art. 6, cl. 2, were issuing Orders of Execution for the benefit of the holder of a State created lien in the presence of previously filed federal tax liens. Petitioner made known to every state Judge involved the presence of these liens and the relevant federal law and federal court decisions. The state judges ignored the issue of priority of federal liens in relation to state liens. The Petitioner was denied procedural and substantive due process and suffered seizure of property and person.

The Petitioner presented a non-frivolous, substantial civil rights complaint and request for injunctive relief to District Court on February 3, 1997. The Complaint was immediately dismissed and the Order was received by the Petitioner the next day. The Order stated, "The court lacks jurisdiction to enjoin the enforcement of valid court order under 28 U.S.C. §2283 and *Younger v. Harris* 401 U.S. 37 (1971)" and then went on to dismiss the claim on the merits for failure to state a claim upon which relief can be granted, and District Court yielded jurisdiction to State Court and stated that Petitioner needs permission of State Court to file any motion. The Order made no reference to any rule of the Federal Rules of Civil Procedure.

This Order was affirmed by the Third Circuit Court of Appeals on November 24, 1997, citing the *Rooker/Feldman* doctrine, *Rooker v. Fidelity Trust Company* 263 U.S. 413, *District of Columbia Court of Appeals v. Feldman* 460 U.S. 462.

The substantiability doctrine requires a District Court to entertain a complaint seeking recovery under the Constitution or the laws of the United States. It "remains the federal rule" *Hagans v. Lavine,* 415 U.S. 528, 538. "If there is any foundation or plausibility to the federal claim, federal jurisdiction exists..." 13 B., Wright, Miller & Cooper, *Federal Practice & Procedure,* jurisdiction 2d §3564 (2d ed. 1984).

Federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them." *Colorado River Water Conser. Dist. v. U.S.* 424 U.S. 800, 817.

B.

It is beyond peradventure for a State lienholder to execute when federal tax liens have been filed previously.

"...[t]he State cannot on behalf of the City impair the standing of the federal lien without the consent of Congress...Congress has protected the federal revenues by imposing an absolute priority [of federal tax liens]...We believe that priority of these statutory liens is determined by another principle of law, namely "The first in time is the first in right." *United States v. City of New Britain, Conn.* 347 U.S. 81, 84. "The relative priority of a lien of the United States for unpaid taxes is always a federal question to be determined finally by federal courts" *U.S. v. Acri* 348 US 211. See *United States v. Equitable Life Assur. Soc. Of U.S.* 384 U.S. 327 and *United States v. McDermott.* 507 U.S. 447.

The federal lien attaches to the debtor's property which is otherwise exempt from levy under state law, *Knox v. Great West Life Assur. Com.*, 212 F. 2d. 784, 785.

The priority of a previously filed federal tax lien can only be displaced only by one of the exceptions enumerated in §26 U.S.C. 6323, none of which apply to the State lienholder.

The court below, in affirming the Order of District Court of February 4, 1997, has abandoned its jurisdiction and the traditional role of federal courts in enforcing the federal tax lien laws, 26 U.S.C. §§6321, 6322, 6323 in allowing executions by the holder of a state-created lien which is inferior to the federal lien.

No court has the jurisdiction to allow a junior lienholder to execute in the presence of a federal lien which has priority.

C.

The allegations support an action under 42 U.S.C. 1983. Congress has mandated that federal courts protect civil liberties.

District Court failed to exercise its Congressional mandate.

> "The test, rather, is whether an Act of Congress, clearly creating a Federal right or remedy enforceable in federal court of equity to be given its intended scope only by the stay of a state court proceeding.
>
> "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the peoples federal rights–to protect the people from unconstitutional acts under cover of state law, 'whether that action be executive, legislative or judicial' ...and this court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum v. Foster* 407 U.S. 225, 238.

Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922 recognized that deprivation of civil liberties can occur by private persons who become state actors by using the procedures of the state or acting in conjunction with state officials.

> "Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributed to the State. These cases reflect a two-part approach to the question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has actively gathered with or has obtained significant aid through state officials, or because his conduct is otherwise chargeable to the state." Id at 937

> "[We] have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Id at 941

The petitioner has been subjected to deprivation of Fourth and Fourteenth Amendment rights. State judges have acted contrary to Acts of Congress and exercised power over property that no judge has. There were multiple executions on bank accounts. The petitioner was arrested twice on two warrants of arrest that CLPHK had drawn up on the same arrest order. The first arrest was for supplementary proceedings for execution. Leonard Kaufman, Esq. caused the second arrest so that he could use the opportunity to present to the court a motion for the appointment of a receiver. Petitioner received no notice of the motion for the appointment of a receiver. State Judge Marguerite Simon, in the absence of personal jurisdiction and in the absence of an interested party (I.R.S.), signed an order for turnover of funds on April 6, 1996 that was deposited into court on August 7, 1992. State Judge Stark appointed a receiver in aid of execution without notice to the petitioner; she acted, and has continued to act, in the absence of personal jurisdiction.

The Petitioner was put at risk of loss of professional reputation by being ordered to surrender possession of Petitioner's billing cards to the receiver. The Petitioner fell three months behind in office rent and was almost evicted; this matter resulted in landlord/tenant court. The Petitioner was not able to pay rent because of the receipts that he was required to surrender to the receiver. The state receiver stated in person and by letter, "Paying your rent is my discretion." The receiver stated that there was no more money when the Petitioner had several important bills to pay. The Petitioner had to survive by disobeying state court orders.

"*Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. §1983 for an alleged deprivation of federal rights." *Wooley v. Maynard* 403 U.S. 705, 710

This Court has held that a claimed deprivation of constitutional rights and diminution of business warranted the issue of a preliminary injunction. *Doran v. Salem Inn, Inc.* 422 U.S. 922.

"The threat of repeated prosecutions in the future...is sufficient to justify injunctive relief." supra *Wooley* 430 U.S. at 712. Both the *Doran* and *Wooley* decisions involved state law and interest that the Court had to consider. *Younger* abstention was not considered applicable because of the deprivation of civil rights. "Where constitutional rights have been infringed upon, the threat of irreparable injury and disservice to the public interest is clear." *Doe v. Duncanville Indep. Sch.Dist.*994 S2d, 160, 163 (5th Cir. 1993) (school prayer).

This case involves deprivation of civil rights, federal law, and no state interest.

The Petitioner's present position is a federal court order that is *res judicata* which allows state court to continue its unconstitutional actions.

II.
THE COURTS BELOW USURPED POWER, ALLOWED VIOLATION OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES, AND ALLOWED A DEFAULT JUDGEMENT AGAINST THE UNITED STATES CONTRARY TO RULE 55(e).

No court has the jurisdiction to allow the holder of a state lien to execute when there is a federal lien that has priority. That power

II.
THE COURTS BELOW USURPED POWER, ALLOWED VIOLATION OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES, AND ALLOWED A DEFAULT JUDGEMENT AGAINST THE UNITED STATES CONTRARY TO RULE 55(e).

No court has the jurisdiction to allow the holder of a state lien to execute when there is a federal lien that has priority. That power resides solely in Congress. *United States v. City of New Britain, Conn.* 347 U.S. at 84

> "A tax lien of the United States, or a title derived from the enforcement of a tax lien of the United States may be discharged or divested under local law only in the manner described in Section 2410 of Title 28 of the United States Code," 26 CFR 400.4-1 (a) (1).

28 U.S.C. §2410, paragraph (a), is a waiver of the sovereign immunity of the United States when one contests property on which there is a federal lien.

Paragraph (b) states the provisions for service on the United States.

> (b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suit involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service

> upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

The state lienholder, CLPHK, stated in their opposition brief to the Third Circuit, "The Internal Revenue Service has been aware of the efforts of CLPH&K to collect on this judgment and has chosen not to enter this dispute. The IRS was aware as early as February 1995 of CLPH&K's initial efforts to recoup certain funds which were seized...The IRS affirmatively chose not to respond. Thus, for several years the IRS has known of Weissman's claim that the IRS is the only entity entitled to payments from him. The IRS has rejected this argument as should the Court." CLPHK communications to the IRS consisted of a letter and copies of motions and cross motions. The lack of response of the IRS cannot be attributed to their approval of the actions of CLPHK.

This construction and conclusion is a legal nullity.

This same faulty construction is in the Order of District Court of February 4, 1997 "[p]articularly given that the priority lienholder, the IRS, elected not to enter the state court matter."

The United States was not served with process.

The holder of the state lien and District Court have relegated the Internal Revenue Service to the status of another lienholder. The federal lien is statutorily protected by federal law and assumes that judges will obey the Supreme Law of the land. The lack of response by the Internal Revenue Service does not have the legal meaning that the holder of the state lien wishes to attribute to it.

CLPHK, with the concurrence of state courts and courts below, have violated the sovereign immunity of the United States.

Rule 55(e) states that there will be no default judgments against the United States. All executions emanating from state court before and after the complaint was filed in District Court and continued while this matter was before the courts below were in violation of this federal rule.

III.
THE COURTS BELOW HAVE DEPARTED FROM FEDERAL JUDICIAL PROCEDURE

The Third Circuit Court of Appeals Order, November 24, 1997, citing the *Rooker/Feldman* doctrine affirming District Court Order of February 4, 1997 which stated that it has no jurisdiction, *Younger* abstention, and then stated that there was failure to state a claim upon which relief can be granted, is arbitrary, capricious and vague.

If District Court disclaims jurisdiction, there is no decision to be made regarding abstention.

The Third Circuit Court of Appeals, citing the *Rooker/ Feldman* doctrine in affirming the Order of District Court, which abstained under *Younger,* is incongruous.

Younger abstention, if appropriate, applies to ongoing state proceedings. The *Rooker/Feldman* doctrine applies to final state court judgements.

The situation that the courts below had to address was the situation on the date of the filing of Petitioner's claim in District Court on February 4, 1997. "We have addressed the situation that existed on the morning of December 10, 1985 when this case was filed in United States District Court..." 481 *Pennzoil Co. v. Texaco Inc.*1, 17

Younger abstention is predicated on the state having an important interest and providing a forum for judicial determination of federal claims. Every principle of *Younger* abstention enunciated in this Court's decision in *Pennzoil* fails in this case. A state court has interest in seeing that its judgements are satisfied. In this case, it cannot Constitutionally do it. Execution of the judgment is rendered nugatory by federal tax lien law. State court did not provide a forum for constitutional claims. They were ignored by state court on multiple presentations by Petitioner. The confidence that this Court has expressed many times that state judges will be bound by the federal constitution, laws and treaties fails here. Art. VI, United States Constitution. State court proceedings can hardly be called judicial in the absence of its failing to reach the merits and deciding by applicable law.

In concurring opinions, Justices Scalia, O'Connor, Brennan, Blackmun and Stevens stated that the *Rooker/Feldman* doctrine did not deprive the Court of jurisdiction in Texaco's challenge to the constitutionality of the Texas lien and bond provisions. Justice Marshall was of the opinion that *Rooker/Feldman* applied because District Court had undergone an impermissible appellate review of the issues. supra *Pennzoil* 481 U.S. 18-29

Lack of jurisdiction precludes District Court from reaching the merits of the case. "Whether the complaint states a cause of action upon which relief can be granted is a question of law...which must be decided after and not before the court has assumed jurisdiction over the controversy" *Bell v. Hood* 327 U.S. 678, 682-83.

Younger abstention, by its nature, requires that federal court not reach the merits of the case. State court is relied upon to reach a decision on an ongoing case in accord with constitutional principles.

Every "fact" stated in the District Court Order to substantiate failure to state a claim upon which relief can be granted is in gross legal error. State judges can be named in a §1983 action whether or not they have liability. The fact that the Internal Revenue Service did not enter this action in state court has no bearing. Federal tax liens are statutorily protected.

The second order of District Court by Judge Marianne Trump Barry filed February 7, 1997 is highly irregular. The first order dismissing Petitioner's action was filed February 4, 1997, and Notice of Appeal was filed that day. The second order eviscerates the §1983 claim by omitting the presence of federal tax liens. This second order appears as if the petitioner filed a complaint that invokes no federal court jurisdiction.

The letters that petitioner received from the Office of Staff Attorneys are irregular. The first letter, dated February 21, 1997, stating that the appeal will be submitted to a panel for a possible jurisdictional defect because it is not a final order, and the second letter of April 21, 1997 stating that

> "It would not be appropriate to submit this Appeal to the Court for a possible jurisdictional dismissal as you were originally advised by a letter of February 25, 1997...All parties are herby

advised, however, that this letter does not represent finding of appellate jurisdiction in this case." (original emphasis)

A District Court order of dismissal is immediately appealable.

On July 16, 1997 the petitioner asked for the file in this action at the Clerk's office of the Third Circuit Court of Appeals. He was informed by Ms. Cass Beach of the Third Circuit clerk's office, orally and by written note, that the file was in the Staff Attorney's office.

The courts below do not appear to have acted according to the mandate of *Haines* and *Estelle*. *Haines v. Kerner* 404 U.S. 519, *Estelle v. Gamble* 429 U.S. 97 The petitioner's pleadings were not liberally construed or given fair and meaningful consideration as to do substantial justice. The immediate dismissal by district court on February 4, 1997 was done without notice to the petitioner and before there could be service of process.

All orders from the Third Circuit Court of Appeals were denials without comment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonas Weissman, *pro se*
541 Cedar Hill Avenue
Wyckoff, NJ 07481
(201) 447-5444

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5065

JONAS WEISSMAN,
Appellant

v.

COHN, LIFLAND, PERLMAN, HERMANN & KNOPF, ESQS.
ALBERT COHN, Head of Cohn Lifland;
LEONARD Z. KAUFMAN, Member of Cohn Lifland;
DIANA MANNING, Member of Cohn Lifland;
MARYANN T. STOKES, Member of Cohn Lifland
LORRAINE ABRAHAM, ESQ., Court Appointed Receiver
SUPERIOR COURT OF NEW JERSEY; BERGEN COUNTY JUSTICE CENTER;
ISABEL STARK, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;
ANTHONY SCUITO, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
PATRICK FITZPATRICK, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
MARGUERITE SIMON, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;

ARTHUR TROAST, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
JEFFREY GAULKIN, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey;
JOHN E. WALLACE, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey

(D.C. Civl. No. 97-cv-00559)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDALL, and ALDISERT,*
Circuit Judges

SUR AMENDED PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The amended petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

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* As to panel rehearing only

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 4 1998

cmh/cc: JW
LZK

JONAS WEISSMAN,
Appellant

v.

COHN, LIFLAND, PERLMAN, HERMANN & KNOPF, ESQS.
ALBERT COHN, Head of Cohn Lifland;
LEONARD Z. KAUFMAN, Member of Cohn Lifland;
DIANA MANNING, Member of Cohn Lifland;
MARYANN T. STOKES, Member of Cohn Lifland
LORRAINE ABRAHAM, ESQ., Court Appointed Receiver
SUPERIOR COURT OF NEW JERSEY; BERGEN COUNTY JUSTICE CENTER;
ISABEL STARK, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;
ANTHONY SCUITO, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
PATRICK FITZPATRICK, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
MARGUERITE SIMON, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;
ARTHUR TROAST, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
JEFFREY GAULKIN, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey;
JOHN E. WALLACE, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey

(D.C. Civl. No. 97-cv-00559)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDALL, and GARTH,*
Circuit Judges

SUR AMENDED PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The amended petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

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*As to panel rehearing only.

RECEIVED AND FILED
12/23/97
P. Douglas Sisk, Clerk

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: DEC 23 1997

CLCL/cc: LZK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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stamped 1/13/98

NO. 97-5065

P. Douglas Sisk

JONAS WEISSMAN,
Appellant

v.

COHN, LIFLAND, PERLMAN, HERMANN & KNOPF, ESQS.
ALBERT COHN, Head of Cohn Lifland;
LEONARD Z. KAUFMAN, Member of Cohn Lifland;
MARYANN T. STOKES, Member of Cohn Lifland
LORRAINE ABRAHAM, ESQ., Court Appointed Receiver
SUPERIOR COURT OF NEW JERSEY; BERGEN COUNTY JUSTICE CENTER;
ISABEL STARK, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;
ANTHONY SCUITO, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
PATRICK FITZPATRICK, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
MARGUERITE SIMON, JUDGE, individually and in her official capacity as Superior Court Judge Bergen County Justice Center;

ARTHUR TROAST, JUDGE, individually and in his official capacity as Superior Court Judge Bergen County Justice Center;
JEFFREY GAULKIN, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey;
JOHN E. WALLACE, JUDGE, individually and in his official capacity as Judge, Appellate Division, Superior Court of New Jersey

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Appeal from the United States District Court
for the District of New Jersey
D.C. Civ. No. 97-cv-00559
(District Judge: Honorable Maryanne Trump Barry)

Submitted Under Third Circuit LAR 34.1(a)
August 25, 1997

Before: BECKER, ALITO, and ALDISERT
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court of February 4, 1997 be and is hereby AFFIRMED. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

Costs taxed against appellant.

BY THE COURT:

/s/ Edward R. Becker

Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

NOV 24 1997

ORIGINAL FILED
FEB 4 1997
William T. Walsh, Clerk

UNITED STATES COURT
FOR THE DISTRICT OF NEW JERSEY

JONAS WEISSMAN,	:	
Plaintiff,	:	Civil Action No. 97-559 (MTB)
v.	:	
COHN, LIFLAND, PERLMAN, HERMAN & KNOPF, ESQS., et al.,	:	**ORDER**
Defendants	:	

This matter having come before the court upon plaintiff's application, filed pro se, for a preliminary injunction with temporary restraints enjoining the enforcement of a January 6, 1997 Order entered by the Superior Court of New Jersey, Law Division, Bergen County, which, among other things, appointed a custodial receiver in aid of the execution of a lien securing a debt owed by plaintiff to defendant Cohn, Lifland, Perlman, Herman & Knopf, Esqs.; and the court having reviewed plaintiff's submissions without oral argument pursuant to Fed. R. Civ. P. 78;

IT IS on this 3rd day of February, 1997

ORDERED that plaintiff's application for temporary

restraints be and hereby is denied for the following reasons: (1) the court lacks jurisdiction to enjoin the enforcement of a valid state court order under 28 U.S.C. § 2283 and Younger v. Harris, 401 U.S. 37 (1971); (2) the judge defendants are immune from suit under 42 U.S.C. § 1983, see, e.g., Harris v. Missouri Court of Appeals, Western District, 787 F.2d 427 (8th Cir. 1986), cert. Denied, 479 U.S. 851 (1986); (3) plaintiff's chances of succeeding on the merits are nil given that the plaintiff otherwise fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983; and (4) plaintiff fails to demonstrate how he will be irreparably harmed if he is required to satisfy an $8,000 junior lien – securing a debt that plaintiff does not dispute the validity of – particularly given that the priority lienholder, the I.R.S., elected not to enter the state court matter. The court further notes that the foregoing does not by any means exhaust the bases upon which this application is denied, which include plaintiff's failure to abide by the January 6, 1997 order entered by the Superior Court of New Jersey, Law Division, Bergen County, which prohibited plaintiff, because of his "recurring abuse of the court system," from filing any motions relating to his underlying claims without prior approval by that court.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

FILED
FEB 7 1997
at 3:00 PM
William T. Walsh, Clerk

ENTERED
ON THE DOCKET
on 2-10-1997
William T. Walsh, Clerk
by /s/ Charles [Sonts]
(Deputy Clerk)

UNITED STATES COURT
FOR THE DISTRICT OF NEW JERSEY

JONAS WEISSMAN,	:	
Plaintiff,	:	Civil Action No. 97-559 (MTB)
v.	:	
COHN, LIFLAND, PERLMAN, HERMAN & KNOPF, ESQS., et al.,	:	**ORDER**
Defendants	:	

This matter having come before the court upon the verified complaint filed by plaintiff Jonas Weissman, pro se, and plaintiff's application for a preliminary injunction with temporary restraints enjoining the enforcement of a January 6, 1997 Order

entered by the Superior Court of New Jersey, Law Division, Bergen County, which, among other things, appointed a custodial receiver in aid of the execution of a lien securing a debt owed by plaintiff to defendant Cohn, Lifland, Perlman, Herman & Knopf, Esqs.; and the court having raised, sua sponte, the issues of the lack of subject matter jurisdiction and plaintiff's failure to state a claim upon which relief can be granted; and

it being the opinion of the court that it lacks jurisdiction to enjoin the enforcement of a valid state court order under 28 U.S.C. § 2283 and Younger v. Harris, 401 U.S. 37 (1971); and

it being the opinion of the court that, because the judge defendants are immune from suit under 42 U.S.C. § 1983, see, e.g., Harris v. Missouri Court of Appeals, Western District, 787 F. 2d 427 (8th Cir. 1986), cert. Denied, 479 U.S. 851 (1986), and plaintiff otherwise fails to state a valid claim under 42 U.S.C. § 1983, plaintiff has failed to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b) (6);

IT IS on this 6th day of February, 1997

ORDERED that plaintiff's complaint be and hereby is dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

BPS-146 March 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **97-5065**

JONAS WEISSMAN

vs.

COHEN, LIFLAND, PERLMAN, HERMANN, & KNOPF, ESQS., ET AL.

(D.N.J. Civ. No. 97-cv-00559

Present:STAPLETON and COWEN, CIRCUIT JUDGES

Submitted is Appellant's "Motion for Emergency Relief", which the Court may wish to construe as a motion for an injunction pending appeal pursuant to Rule 8(a), Federal Rules of Appellate Procedure

In the above-captioned case.

Respectfully,

/s/ P. Douglas Sisk/WFK
Clerk

PDS/WFK/ms

_____ ORDER _____

The foregoing motion for an emergency temporary restraining order is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: MAR 26 1997
cmh/cc: JW

BPS-197 May 1, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **97-5065**

JONAS WEISSMAN

vs.

COHEN, LIFLAND, PERLMAN, HERMANN, & KNOPF, ESQS., ET AL.

(D.N.J. Civ. No. 97-cv-00559

Present:STAPLETON and COWEN, CIRCUIT JUDGES

Submitted is Appellant's "Motion for Emergency Relief", which the Court may wish to construe as a motion for an injunction pending appeal pursuant to Rule 8(a), Federal Rules of Appellate Procedure

In the above-captioned case.

Respectfully,

/s/ P. Douglas Sisk/WFK
Clerk

PDS/WFK/ms

ORDER

The foregoing motion is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: MAY -6 1997
cmh/cc: JW
LZK
LA

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 25, 1997

No. 97-5065

JONAS WEISSMAN,

Appellant

vs.

COHN, LIFLAND, PERLMAN, HERMANN & KNOPF, ESQS., et al.

(D.C. Civil No. 97-00559 - Newark)

Present: BECKER, ALITO, and ALDISERT, Circuit Judges.

Motion by appellant for appointment of counsel.

/s/ Margaret G. Davis
Margaret G. Davis 597-5011
Case Management Supervisor

Submitted on the merits 8/25/97.

The foregoing motion is denied.

By the Court

/s/ Edward R. Becker
Circuit Judge

Dated OCT 9 1997
cmh/cc JW
LZK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 25, 1997

No. 97-5065

JONAS WEISSMAN,
Appellant

vs.

COHN, LIFLAND, PERLMAN, HERMANN & KNOPF, ESQS., et al.

(D.C. Civil No. 97-00559 - Newark)

Present: BECKER, ALITO, and ALDISERT, Circuit Judges.

Motion by appellant for appointment of counsel.

/s/ Margaret G. Davis
Margaret G. Davis 597-5011
Case Management Supervisor

Submitted on the merits 8/25/97.

ORDER

The foregoing motion is denied.

By the Court

/s/ Edward R. Becker
Circuit Judge

Dated OCT 9 1997
cmh/cc JW
LZK

*AMENDED BPS-245 June 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 97-5347

IN RE: JONAS WEISSMAN

(RELATED TO D. N.J. CIV. NO. 97-cv-00559)
HONORABLE MARYANNE TRUMP BARRY,
NOMINAL RESPONDENT

Present: CHIEF JUDGE SLOVITER, STAPLETON AND COWEN, CIRCUIT JUDGES

Submitted are:

5. Petitioner's petition for a writ of mandamus, pursuant to Rule 21, Federal Rules of Appellate Procedure, with supplement;

6. Petitioner's amended petition for writ of mandamus, with addendum; and

*(3) **Petitioner's motion to expedite petition for writ of mandamus**

In the above-captioned case.

Respectfully,

/s/ P. Douglas Sisk/CJG
Clerk

PDG/CJG

ORDER

The foregoing petition and amended petition for writ of mandamus are denied. The motion to expedite is denied as moot.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: JUL 18 1997
cmh/cc MRG
MTB
JW
LZK

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

26 U.S.C. §6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. §6322 Period of lien

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or become unenforceable by reason of lapse of time.

26 U.S.C. §6323 Validity and priority against certain persons

(a) Purchases, holders of security interests, mechanic's lienors, and judgment lien creditors.–The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed

by the Secretary.

(b) Protection for certain interest even though notice filed.–Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid–

(1) Securities.–With respect to a security (as defined in subsection (h)(4))00

(A) as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles.–With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if–

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail.–With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale.– With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such line, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien.– With respect to tangible personal property subject to a lien under local

law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens.–With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien securies payment of–

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public sevices furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) Residential property subject to a mechanic's lien for certain repairs and improvements.–With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000. **(8) Attorneys' liens.**–With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforceable against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United Sates offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts.–With respect to a

life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time–

(A) before such organization had actual notice or knowledge of the existence of such lien;

(B) after such organization had such notice or knwoeldge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Passbook loans.–With respect to a savings deposit, share, or other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(c) Protection for certain commercial transactions financing agreements, etc.–

(1) In general.–To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which–

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting–

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement.–For purposes of this subsection–

(A) Definition.–The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)--

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property.–The term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined. –The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquiring security interest.–A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interets in commercial financing security.

(3) Real property construction or improvement financing agreement.–For purposes of this subsection–

(A) Definition.–The term "real property construction or improvement financing agreement" means an agreement to make cash disbursements to finance–

(i) the construction or improvement of real property,

(ii) a contract to construct or improve

real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property.–The term "qualified property", when used with respect to a real property construction or improvement financing agreement, includes only–

(i) in the case of subparagraph (A)(i), the real property with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement.–For purposes of this subsection–

(A) Definition.–The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on qualified property.–The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements.– Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person–

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of a contract of which was ensured, and

(ii) if the contract the performance of which was ensured as a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(d) 45-day period for making disbursements.–Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien fiing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest–

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing; and

(2) is protected under local law against a judgement lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) Priority of interest and expenses.–If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to–

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) The reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any lien on the property to

which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the imposed by section 6321.

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(f) Place for filing.–The notice referred to in subsection (a) shall be filed.

(A) Under State laws.–

(i) Real property.–In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the line is situated; and

(ii) Personal property.–In the case of personal property, whether tangible or intangible, in one office within the state (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court.–In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (a); or

(C) With Recorder of Deeds of the District of Columbia.–In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien.–For purposes of paragraphs (1) and (4), property shall be deemed as situated–

(A) Real property.–In the case of real property, at its physical location; or

(B) Personal property.–In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes or paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the

principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form.–The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property. In the case of real property, if–

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspction of the index will reveal the existence of the lien.

(5) National filing systems.–The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

(g) Refiling of notice.–For purposes of this section–

(1) General rule.–Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien whall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) Place for filing.–A notice of lien refiled during the required refiling period shall be effective only–

(A) if–

(i) such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii) in the case of real property, the fact of refiling is entered and recorded an in index to the extent required by subsection (f)(4); and

(B) in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulatinos issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) Required refiling period.–In the case of any notice of lien, the term "required refiling period" means–

(A) the one-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax, and

(B) The one-year period ending with the expiration of 6 years after the close of the preceding required refiling period for such notice of lien.

(4) Transitional rule.–Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required filing period shall be calendar year 1967.

(h) Definitions.–For purposes of this section and section 6324–

(1) Security interest.–The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) Mechanic's lienor.–The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under

local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) Motor vehicle.–The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) Security.–The term "security" means any bon, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right ot subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) Tax lien filing.–The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321.

(6) Purchaser.–The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purpose of subsection (a) of this section, and for purposes of section 6324–

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property, which is not a lien or security interest shall be treated as an interest in property.

(i) Special Rules.–

(1) Actual notice or knowledge.–For purposes of this subchapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the

organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence des not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) Subrogation.–Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

(3) Forfeitures.–For purposes of this subchapter, a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other local governmental subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county, or other local governmental subdivision of the property.

CFR 400.4-1

Internal Revenue Services, Treasury, 26 CFR §400.4-1, states in pertinent part:

"A tax lien of the United States, or a title derived from the enforcement of a tax lien of the United States may be discharged or divested under local law only in the manner described in Section 2410 of Title 28 of the United States Code."

Fed. R. Civ. Proc. Rule 55. Default

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

28 §2410 Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any state court having jurisdiction of the subject matter–

(1) to quiet title to,
(2) to foreclose a mortgage or other lien upon,
(3) to partition
(4) to condemn, or
(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suit involving liens arising under the internal revenue laws, the complaint

or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.